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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 827

SOUTHERN PACIFIC COMPANY,

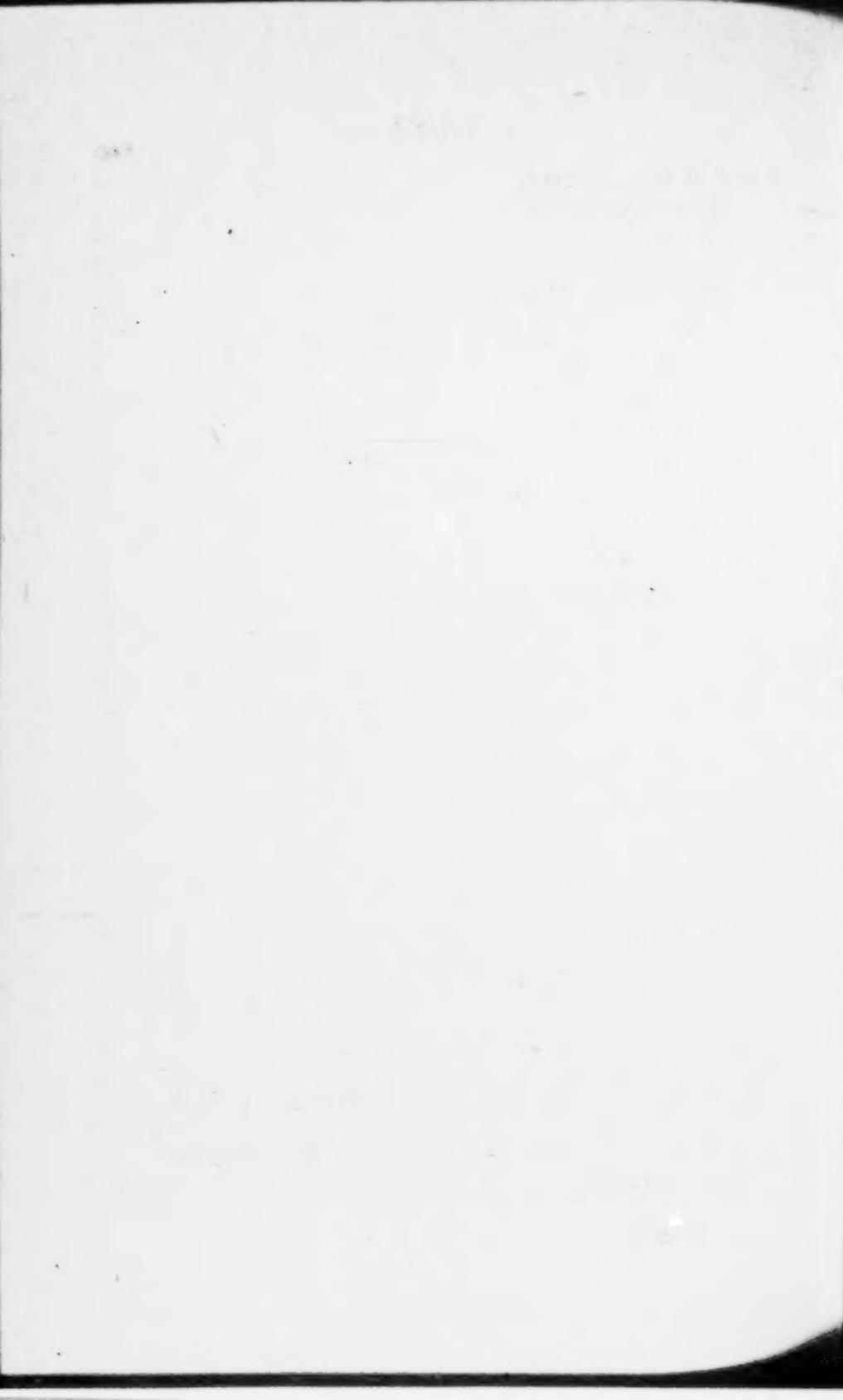
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF FOR PETITIONER
IN SUPPORT THEREOF.

C. O. AMONETTE,
LAWRENCE CAKE,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 827

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

Southern Pacific Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered on October 7, 1946, in the above entitled case, docketed as Nos. 45952 and 46012 in the Court of Claims.

Summary Statement of the Case

In the summer and early fall of 1941, petitioner, a common carrier by railroad, performed transportation service for the United States by carrying certain shipments of heavy duty motor trucks, knocked down and boxed for export and shipped by rail to San Francisco, consigned to China Defense Supplies, Inc., in care of certain steamship lines.

The motor trucks in question were trucks which had been purchased by the United States for transfer and delivery to representatives of the Republic of China, pursuant to requisitions made by the Republic of China and authorization of the President of the United States, under the Lend-Lease Act of March 11, 1941, c. 11, 55 Stat. 31. A part of the trucks so requisitioned and furnished were described as 6 x 6 (meaning with six wheels, all powered) heavy duty tactical type trucks, and part were described as 4 x 2 (meaning with four wheels, two of which were powered) heavy duty general transport type trucks. The Court of Claims found that all these trucks were requisitioned and intended for use by the Chinese Army and also found that they were similar to trucks procured and used by the United States Army and conformed to the specifications of the War Department for trucks for use by the United States Army.

For the carriage by rail from the points of origin to San Francisco, petitioner billed the transportation charges at the applicable commercial rates. Payment was made by the Government at lower net rates constructed by making land-grant deductions from the applicable commercial rates, *i. e.* at net land-grant rates. Petitioner thereupon brought this action to recover the difference between net land-grant rates as paid, and the full commercial rates claimed.

The case turns on the construction and application of Section 321(a), Title III, Part II, of the Transportation Act of 1940, which provides that the full applicable commercial rates, fares, or charges shall be paid for the transportation of persons or property for the United States, except in the case of military or naval property of the United States moving for military or naval and not for civil use, or members of the military or naval forces of the United States when such members are traveling on official duty. If

the exception applies to the shipments in question, land-grant rates were rightly paid. If the exception does not apply to these shipments, the petitioner is entitled to recover the difference between land-grant rates, as paid, and the full commercial rates claimed.

The Court of Claims held:

1. That the use of the expression "and not for civil use" is clearly an intention that no construction shall be given the term "military" that will include the idea of civil use; that is to say, the term "military" is to be given a strict construction (R. 21).
2. That the motor vehicles in question were not for civil use but were intended for use by the Chinese Army; that is, intended for military and not for civil use (R. 22).
3. That the military use referred to in the Transportation Act of 1940 is not to be confined to use by the United States Army, and the furnishing of military equipment for the use of the Chinese Army under the lend-lease program is military use of military equipment in the sense of the Transportation Act of 1940 (R. 22).
4. That the shipments in question were shipments of military property of the United States moving exclusively for military use, and therefore land-grant rates were applicable and petitioner is not entitled to recover (R. 23).

Statute Involved

The statute in question is Section 321(a), Title III, Part II, of the Transportation Act of 1940; Act of September 18, 1940, c. 722, 54 Stat. 898, 954; 49 U. S. Code, sec. 65(a):

"Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full

applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty: * * *

The Questions Presented

The important questions in this case, decided by the Court of Claims, are:

I. Whether heavy duty motor trucks procured by the United States, at a time when it was not at war, for transfer and delivery under the Lend-Lease Act to China Defense Supplies, Inc., on a requisition by the Republic of China specifying that the trucks were for "Army use", were, at the time of transportation, military property of the United States in the sense of the Transportation Act of 1940.

II. Whether such heavy duty motor trucks procured by the United States and shipped by rail to San Francisco for transfer and delivery under the Lend-Lease Act to China Defense Supplies, Inc., acting for the Republic of China, were, at the time of transportation, moving for military use in the sense of the Transportation Act of 1940.

III. Whether the words of the exception in Section 321 (a) of the Transportation Act of 1940—"military or naval * * * use"—include "use" by other countries, or are limited to "military or naval * * * use" by the armed forces of the United States.

Specification of Errors

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States in the sense of the Transportation Act of 1940.
2. In holding that the shipments in question were moving for military use in the sense of the Transportation Act of 1940.
3. In holding that the shipments in question were moving for military use in the sense of the Transportation Act of 1940, upon a finding that they were shipped by rail to San Francisco for transfer and delivery to China Defense Supplies, acting for the Republic of China, under the Lend-Lease Act of March 11, 1941, and in failing to hold that such movement for disposition under the Lend-Lease Act was not movement for use in the sense of the Transportation Act of 1940.
4. In holding that military use by the Republic of China, at a time when the United States was not at war, is "military * * * use" in the sense of the Transportation Act of 1940, and in failing to hold that military use in the sense of the Transportation Act of 1940 refers to military use by the armed forces of the United States.

Reasons for Allowance of the Writ

The decision of the Court of Claims involves the construction of Section 321(a) of the Transportation Act of 1940, as applied to shipments of commodities and articles procured by the United States for transfer and delivery to other countries under the Lend-Lease Act.

On all such shipments of lend-lease material and supplies, of whatever character, the Government has claimed land-grant rates and all settlements of the railroad carriers' transportation bills have been made on that basis, the

position of the Government being that "defense articles" in the sense of the Lend-Lease Act are necessarily "military or naval property of the United States" moving exclusively for military or naval use in the sense of the Transportation Act of 1940.

The volume of the traffic in question is very large and there are numerous cases pending in the Court of Claims and in the district courts involving similar claims. There are also many thousands of disputed accounts, involving land-grant deductions and disallowances, held in suspense accounts by the several carriers which have handled lend-lease freight traffic over routes involving land-grant mileage.

This Court has granted certiorari in two similar cases, *United States v. Powell et al.* and *United States v. Atlantic Coast Line R. Co.*, Nos. 56 and 57, October term 1946, which involve shipments of phosphate rock and superphosphate to the British Ministry of War Transport for use as fertilizer to increase agricultural production in England. It is submitted, however, that the decision of those cases, in view of the character of the commodities and articles there in question, will not settle the important questions above stated and will not necessarily be controlling in the very large number of similar cases involving shipments of lend-lease material and supplies now pending or which may be filed.

Wherefore, it is respectfully submitted that the writ of certiorari herein prayed should be allowed.

C. O. AMONETTE,
LAWRENCE CAKE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 827

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent

**BRIEF FOR PETITIONER IN SUPPORT OF PETITION
FOR CERTIORARI**

Opinion Below

The opinion of the Court of Claims is reported in — F. Supp. —, and is included in the record herein (R. 20).

Jurisdiction

The judgment of the Court of Claims was entered on October 7, 1946 (R. 23). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended; 28 U. S. Code, Section 288.

Statement of the Case

The case is stated in the petition for certiorari. It involves shipments of heavy duty motor trucks knocked down

and boxed for export, procured by the United States for transfer and delivery to the Republic of China under the Lend-Lease Act of March 11, 1941, in the summer and fall of 1941 prior to the entry of the United States into the war.

The question presented, in general terms, is whether petitioner, a common carrier by railroad, should have been paid for the transportation by rail of these shipments to San Francisco for transfer and delivery to representatives of the Republic of China, on the basis of the full commercial rates claimed, or on the basis of net land-grant rates. If the shipments in question were shipments of military property of the United States moving exclusively for military use, in the sense of the Transportation Act of 1940, the payments made on the basis of net land-grant rates were correct. If these shipments were not shipments of military property of the United States moving exclusively for military use in the sense of the Transportation Act of 1940, petitioner is entitled to recover the balance claimed.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States in the sense of the Transportation Act of 1940.
2. In holding that the shipments in question were moving for military use in the sense of the Transportation Act of 1940.
3. In holding that the shipments in question were moving for military use in the sense of the Transportation Act of 1940, upon a finding that they were shipped to San Francisco by rail for transfer and delivery to China Defense Supplies, acting for the Republic of China, under the Lend-Lease Act of March 11, 1941, and in failing to hold that such movement for disposition under the Lend-Lease Act was not

movement for use in the sense of the Transportation Act of 1940.

4. In holding that military use by the Republic of China, at a time when the United States is not at war, is "military * * * use" in the sense of the Transportation Act of 1940, and in failing to hold that military use in the sense of the Transportation Act of 1940 refers to military use by the armed forces of the the United States.

Outline of the Argument

I. Commodities and articles procured by the United States for transfer and delivery to other countries, under the Lend-Lease Act of March 11, 1941, at a time when the United States was not at war, are not "military or naval property of the United States" in the sense of the Transportation Act of 1940.

(1) The background and legislative history of Section 321(a) of the Transportation Act of 1940 demonstrate that its purpose was to relieve the railroads of the greater part of an obligation which impaired their ability to meet adequately the needs of interstate commerce, by contracting the obligation within its original limits, *i. e.* to property, rations, uniforms, equipment, and supplies of the armed forces of the United States. The commodities and articles in question were not purchased or intended for use by the military or naval forces of the United States and were, therefore, not "military or naval property of the United States" within the intendment of the Transportation Act of 1940.

(2) The trucks in question, purchased and intended for transfer and delivery to China, at a time when the United States was not at war, were not "military or naval property of the United States" in the sense of the Transpor-

tation Act of 1940 *at the time of movement by rail* to San Francisco. Transportation rates must be determined as of the date of movement and depend on the character of the commodity or article shipped, at that time. The character of the articles in question was simply that of motor trucks, with spare parts and tools, moving to San Francisco for transfer and delivery to a foreign government. That they were for export to China as lend-lease aid and that the Chinese Government intended to use them in military operations against the Japanese are irrelevant facts on the issue here presented.

In this respect the decisions of this Court and the Court of Claims on the obligation of the railroads—prior to the Transportation Act of 1940—to carry “troops of the United States” at reduced rates, indicate the test which must be applied. *Alabama Great Southern R. Co. v. United States*, 45 Ct. Cls. 522; *United States v. Union Pacific R. Co.*, 249 U. S. 354. In those cases it was held that it was the status of the individual travelers *at the time of movement* which determined whether or not they were “troops of the United States” in the sense of the land-grant statutes, and not the fact that they had been soldiers or that they were potential soldiers, or that the transportation was related in some way to the operation of the military establishment. As this Court said in the *Union Pacific* case, 249 U. S. at page 359:

“And the fact that the transportation is for the purposes of the government in connection with its military establishment is immaterial. Workmen in armor plants and civilian clerks in the War Department at Washington travel for purposes of the government, but are obviously not ‘troops of the United States’ within the meaning of the land-grant legislation.”

II. Commodities and articles shipped by rail to ports for transfer and delivery to the representatives of other

countries are not "moving for military or naval and not for civil use" in the sense of the Transportation Act of 1940.

Such movements are not movements for use at all, so far as the United States is concerned, but for disposition to a foreign government under the authority of the Lend-Lease Act. There is a clear distinction in law between sale or other disposition, on the one hand, and use, on the other hand. *McLeod v. Dillworth Co.*, 322 U. S. 327, 330-331. The sale or disposition of property is not consistent with its use. The movement of property to "sell, transfer title to, exchange, lease, lend, or otherwise dispose of" it—the language of the Lend-Lease Act—is not movement for use.

That property moving for the purpose of being transferred to a foreign government is moving for disposition rather than use is given recognition by the Defense Aid Supplemental Appropriation Act 1941, 55 Stat. 53, 54, which provides in Section 3:

"Any defense article procured from an appropriation made by this act shall be retained by or transferred to and for the use of such department or agency of the United States as the President may determine, in lieu of being disposed of to a foreign government, whenever in the judgment of the President the defense of the United States will be best served thereby."

The Lend-Lease Act was not unique in the authorization of sale or other disposition of property of the United States. Compare the Act of May 10, 1918, c. 70, 40 Stat. 548; the Act of June 5, 1920, c. 240, 41 Stat. 949; the Act of June 28, 1940, c. 440, Title I, section 14, 54 Stat. 681; and the Act of June 15, 1940, c. 365, 54 Stat. 396.

III. The words "military or naval * * * use" in Section 321(a) of the Transportation Act of 1940 should

fairly be construed to mean "military or naval . . . use" by the military or naval forces of the United States.

1. The purpose of Section 321(a) was to contract the land-grant obligation of the railroads within its original limits, *i. e.* to property, rations, uniforms, equipment, and supplies of the armed forces of the United States.

2. The exception in favor of military and naval traffic is a single exception, applicable to military or naval *property* of the United States and to the military or naval *forces* of the United States, and should be consistently read as such—military or naval property within the exception being only such property as is transported for the use of the military or naval forces of the United States.

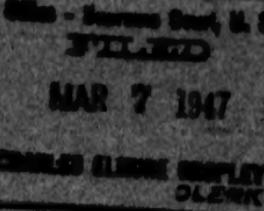
3. The obligation of the railroads to carry "military or naval property of the United States" at reduced rates is narrower under the Transportation Act of 1940 than it was under prior law when it extended to all property of the United States. Even then, when the obligation was broader, it was never held to extend to the transportation of property for the benefit of others than the United States or to transportation for which others were liable to reimburse the United States. *Henry H. Cross Co. v. United States*, 133 F. (2d) 183; *Givens v. Louisville & N. R. Co.*, 140 I. C. C. 605, 606; *Havens v. Chicago & N. W. R. Co.*, 20 I. C. C. 156, 158.

Respectfully submitted,

C. O. AMONETTE,
LAWRENCE CAKE,
Counsel for Petitioner.



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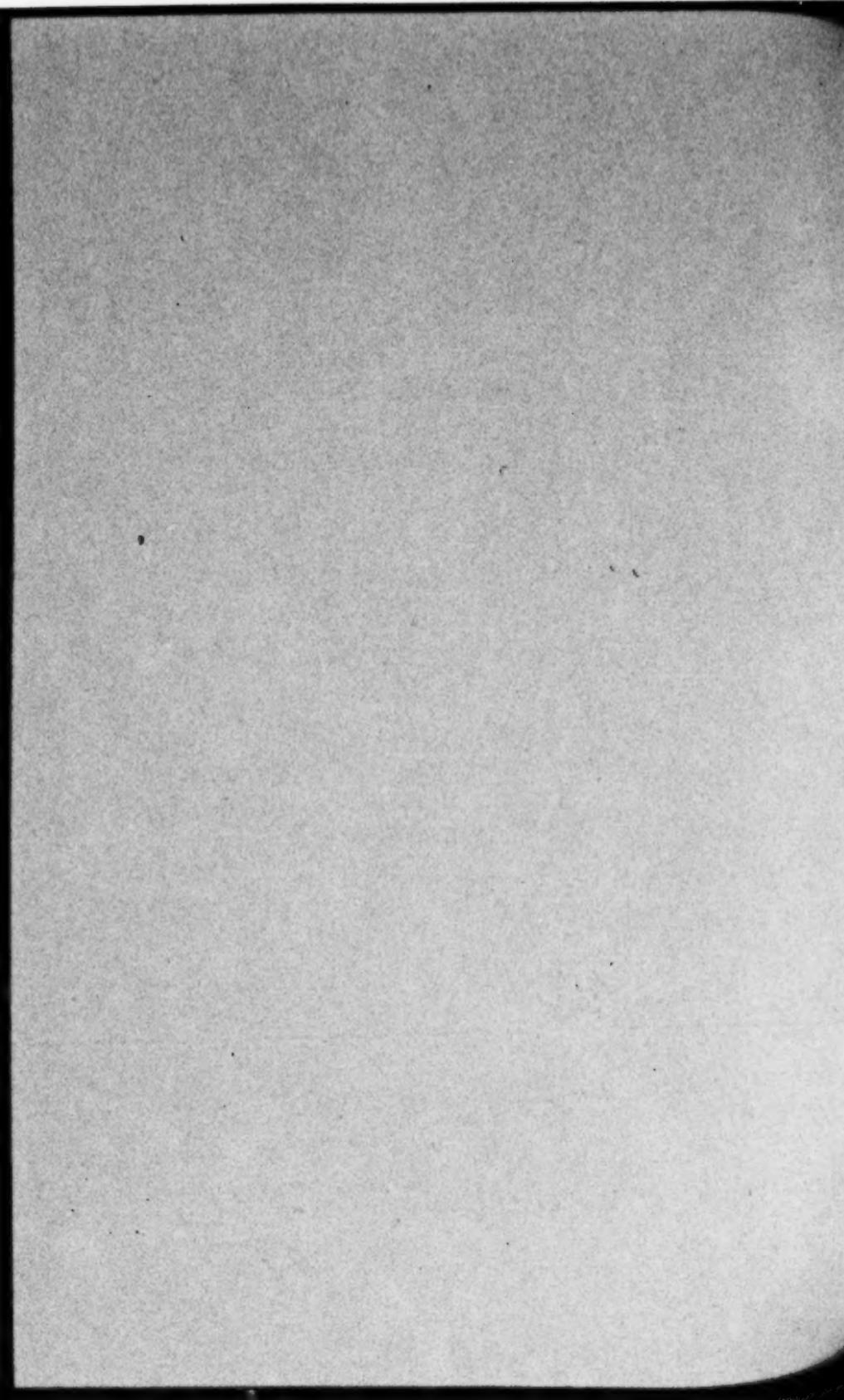
SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION



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(1)

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OPINION BELOW

The opinion of the Court of Claims (R. 20-23) is reported at 67 F. Supp. 966.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1946 (R. 23). The petition for a writ of certiorari was filed December 30, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether lend-lease shipments of military goods moving on Government bills of lading for use

by the Chinese army constitute "military or naval property of the United States moving for military or naval and not for civil use", within Section 321 (a) of the Transportation Act of 1940, and hence are entitled to move at land grant rail rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 65 (a), and of the Lend-Lease Act, 55 Stat. 31, 22 U. S. C., Supp. V, 411-419, are set forth in the Appendix, pp. 6-10.

STATEMENT

The petitioner railroad instituted this proceeding in the Court of Claims to recover a land-grant deduction of \$61,314.04 taken by the United States on shipments of trucks to San Francisco in the autumn of 1941 (R. 14, 15, 16). The shipments involved had been moved by petitioner, in participation with other interstate rail carriers, on Government bills of lading and were consigned to China Defense Supplies, Inc., acting on behalf of the Republic of China (R. 14, 15, 20). Petitioner, as delivering carrier, had employed the full commercial rate in calculating the freight bills of \$140,730.44 which it presented to the United States (R. 15, 16). After taking land-grant deductions, the Government paid \$79,416.40 to petitioner.

The trucks here involved had been purchased and shipped by the United States under its Lend-Lease program (R. 17-18). The Presidential authorization for the purchase and shipment was based on an appropriate request by the Republic of China for the trucks and was accompanied by a finding that the shipments would be in the interest of national defense (R. 17-18).¹ The Court of Claims found that the trucks were of military design and type, and were intended both by the United States and the Republic of China for military use by the Chinese Army (R. 19-20).

The court below held that the shipments were "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940 and that, accordingly, the land-grant deduction was properly taken by the United States (R. 21-23).

¹ Petitioner refers to these trucks as having been "procured" by the United States on a "requisition" by the Republic of China (Pet. 4). The trucks were purchased by the Quartermaster General, pursuant to directions by the Secretary of War to effectuate the President's authorization, from the Lend-Lease appropriation, and in furtherance of the purposes of the Lend-Lease Act (R. 18). The shipments here involved were the property of the United States (R. 20). The "requisition" by the Republic of China was the appropriate method of instituting Lend-Lease action, the "requisition" being presented to the United States by the Allied government seeking aid (R. 18-19).

ARGUMENT

Under Section 321 (a) of the Transportation Act of 1940, land-grant deductions are reserved to the United States on shipments of "military or naval property of the United States moving for military or naval and not for civil use." Petitioner would exclude all lend-lease shipments from the scope of the provision by restricting it to shipments of military or naval property for use by the armed forces of the United States. No exception from the rule thus urged is recognized by petitioner even where, as here, the shipments were comprised of trucks of military design and type, purchased and shipped by the United States for military use by the Chinese Army. This narrow construction was properly rejected by the court below, and no review of its decision is warranted. In *United States of America v. Powell*, and *United States of America v. Atlantic Coast Line Railroad Company*, Nos. 56 and 57, this Term, and *Northern Pacific Railway Company v. United States of America*, No. 400, this Term, decided March 3, 1947, this Court expressly recognized that the reduced rates established by Section 321 (a) were intended to apply to Government military property moving for military use by "an ally rather than by this nation," and that military shipments under the Lend-Lease Act were entitled to land-grant tariffs.

CONCLUSION

The decision below was correct and squarely accords with this Court's recently expressed views. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

JOHN FORD BAECHER,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
JANE A. PARKER,
Attorneys.

MARCH 1947.

APPENDIX

Section 321 (a) of the Transportation Act of September 18, 1940, 54 Stat. 898, 49 U. S. C. 65 (a) provides, in part, as follows:

PART II—RATES ON GOVERNMENT TRAFFIC Government To Pay Full Rates

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *

The Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C., Supp. V, 411-419, provides, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States".

SEC. 2. As used in this Act—

(a) The term “defense article” means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term “defense article” includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term “defense information” means any plan, specification, design, prototype, or information pertaining to any defense article.

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed \$1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

* * * * *

SEC. 8. The Secretaries of War and of the Navy are hereby authorized to purchase

or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

SEC. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

SEC. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other non-combatant purposes enumerated in this Act.